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SERIES I: Subject File

TALKING POINTS
WHITE HOUSE RECEPTION FOR THE SUPREME COURT JUSTICES
October 3, 1983

-- Last year we renewed the tradition of having an annual gathering to commemorate the start of a new Term of the Supreme Court. That tradition had its historic roots in the days when the Justices would call upon the President to inform him that they had survived the rigors of another round of circuit riding and were ready to begin their work in Washington. I know you don't face the hardships of stagecoach and horseback as your predecessors did, but I'm told that the huge stacks of petitions that greet you every day during the summer months can be just as bad.

-- The presence of the Supreme Court reminds me of a true story about a previous occupant of this House, Abraham Lincoln. The Civil War was raging around Washington and Lincoln decided to inspect the fortifications. He was being shown around by a young aide to the commanding general, and Lincoln and the aide walked right up to the front lines. Suddenly, shots rang out from the Confederate forces, and the young aide knocked Lincoln to the ground, shouting, "Get down, you fool!" The aide thought that his career was over, but when Lincoln finished his tour and turned to leave, he looked at the aide and said, "Good bye, Captain Holmes, I'm glad to see that you know how to talk to a civilian." Captain Holmes went on to become Justice Oliver Wendell Holmes, Jr. I've often wondered if the thrill of manhandling a President is what put it into Holmes' mind to become a Justice of the Supreme Court.

-- The differences of opinion that must on occasion arise between the three branches of our Government should never obscure the fact that we are all engaged in the same noble experiment our forefathers embarked upon when they framed our Constitution. To paraphrase what one of the Justices (Brennan) said of differences of opinion on the Court itself, we have a harmony of aims if not always of views.

-- Referring to the Supreme Court, Justice Holmes once said, "We are very quiet there, but it is the quiet of a storm center, as we all know." It is a mark of the respect Americans have for the rule of law and for the Supreme Court as an institution that bitter disputes can be resolved in the quiet of your chambers.

-- As you begin the new Term and embark on the writing of another chapter in the history of our Constitution, know that you do so with the enduring respect and best wishes of the American people. We know that your work demands courage in as great a measure as wisdom. We know the enormity of the challenges you face, but we are also confident that, with God's grace, you will rise to meet them.

STATEMENT

OF

JONATHAN C. ROSE

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL POLICY

CONCERNING

THE WORKLOAD OF THE SUPREME COURT

BEFORE

THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES

AND THE ADMINISTRATION OF JUSTICE

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 10, 1983

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today to discuss the nature and causes of the workload crisis now faced by the Supreme Court of the United States, and some possible solutions to that problem.

My testimony today is divided into four parts. The first part addresses the threshold issue of the existence of a workload problem in the Supreme Court. It also addresses the specific inquiry suggested in the invitation to testify -- the role that government litigation policy has played in the growth of the Court's workload.

I will then discuss the causes of the rising federal caseload, and some measures that should be taken to reduce it. Specifically, Part II discusses the need for greater judicial restraint and for Congress to avoid enacting legislation that encourages litigation. Part III discusses a variety of legislative proposals, most of which are already before Congress, which would substantially reduce the caseloads of the Supreme Court and the lower federal courts.

In the fourth and final part of my testimony, I will address the Intercircuit Tribunal proposal. To summarize our conclusion, we do not believe that a sufficient case has been made that the creation of an adjunct tribunal to the Supreme Court is necessary as a long-range solution to the Court's

workload problem. We do, however, support the creation of a temporary, properly designed Intercircuit Tribunal as an immediate response to the current workload crisis. Such temporary assistance would provide Congress with the time to develop and enact more effective solutions to the explosive growth of federal litigation.

I. The Supreme Court's Workload and Government Litigation

A. The Supreme Court's Workload

In recent public statements, the Justices of the Supreme Court have been essentially unanimous in their view that there is a serious workload problem in the Court and that remedial measures are necessary. The statistics concerning cases given plenary review by the Court provide independent support for the Justices' statements. Over the past few years, there has been a large increase in the number of cases argued before the Supreme Court -- increasing from 156 in the 1979 Term to 183 in the 1982 Term. This increase in cases argued each Term has also been accompanied by a large increase in accepted cases carried over from Term to Term. 1/

1/ The number of cases accepted for plenary review carried over to the next Term rose from 78 at the end of the 1979 Term to 113 at the end of the 1982 Term.

Superficially, it might appear that the Justices should bear some responsibility for this increase, because the Court has discretion to grant or deny certiorari with respect to over three-fourths of the cases accepted for argument. However, the growth of the caseload in the federal court system as a whole makes it clear that the Supreme Court's exercise of its certiorari jurisdiction is not the essential problem.

The volume of litigation in the Supreme Court is dependent to a large degree on the number of potentially appealable decisions rendered in the lower courts. In the 1982 Term, for example, about 4,200 new cases were filed in the Supreme Court, in comparison with about 4,000 in the 1979 Term and 3,400 in the 1970 Term. 2/ This increase in the Supreme Court's

anything, understates the dramatic increase in lower

Between 1979 and 1983, for

197,000 to

court caseloads in

example, filings in the district courts

2/ Statistics in this statement on the Supreme Court and government litigation in the Supreme Court are generally taken from the annual reports of the Solicitor General's office, which are published as part of the Annual Report of the Attorney General. Year numbers given in connection with such statistics refer to the terms of the Supreme Court, which normally run from October of one year to June of the next. For example, the 1982 term runs from October, 1982 to June, 1983. Preparation of the report of the Solicitor General's office on the most recent term (1982) has not been completed at this point; statistics relating to the 1982 term in this statement have been obtained from the office of the Clerk of the Supreme Court.

278,000, and filings in the courts of appeals rose from 20,000 to nearly 30,000. 3/

If the Supreme Court is to discharge its responsibilities of interpreting the Constitution, supervising the lower courts, and resolving decisional conflicts, it is clear that the Court cannot simply sidestep the caseload problem by reviewing an ever-smaller fraction of lower court decisions. Accordingly, the workload of the Supreme Court cannot sensibly be separated from the broader problem of overload in the court system as a whole. Remedial measures, if they are to provide more than temporary, symptomatic relief, must address this broader problem.

B. Government Litigation

1. Litigation Statistics. The Subcommittee's invitation to testify asked that the Department of Justice address the extent of government litigation before the Supreme Court, and its contribution to the Court's workload. While the government continues to be the most frequent party to appear before the

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3/ The statistics on inferior court caseloads in this statement are generally taken from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. Year numbers given in connection with such statistics refer to the Administrative Office's reporting years, which end on June 30. For example, reporting year 1982 covers the twelve-month period ending June 30, 1982. Statistics relating to the 1983 reporting year were obtained directly from the Administrative Office of the U.S. Courts.

Court, the general level of government applications for review in the Supreme Court has stayed the same over the past decade. The average annual number of applications has been 68, ranging from a low of 60 in 1978 and 1980 to a high of 80 in 1974. The figure for the most recent term on which complete statistics are available, 1981, was 74. 4/

The government's applications for review are usually granted by the Court. Over the five year period from 1977 to 1981, for example, 70 percent of the government's petitions for certiorari were granted, ranging from a low of 58 percent in 1977 to a high of 79 percent in 1981. 5/ This success rate reflects the careful screening of government cases by the Solicitor General's office before the decision is made to file a petition. In comparison, over the same five-year period, only from 5 percent to 6 percent of all petitions for certiorari filed in the Supreme Court were granted each year.

4/ Government applications from 1972 to 1981, including both certiorari petitions and appeals, were as follows: 1981--74; 1980--60; 1979--65; 1978--60; 1977--68; 1976--65; 1975--61; 1974--80; 1973--75; 1972--73.

5/ For the period from 1972 to 1981, government petitions for certiorari accepted out of all government petitions for certiorari were as follows: 1981--45 out of 57; 1980--31 out of 50; 1979--43 out of 55; 1978--37 out of 52; 1977--33 out of 57; 1976--37 of of 48; 1975--38 out of 50; 1974--47 out of 66; 1973--39 out of 61; 1972--36 out of 52.

The number of cases in which Supreme Court review was sought by a private party suing or opposing the government in litigation also has not changed significantly in the past decade. The average annual number of applications was 1,627 for the period from 1972 to 1981, ranging from a low of 1,507 in 1972 to a high of 1,906 in 1976. The figure for the 1981 term was 1,589. 6/

In recent years, the government typically has participated in some manner in about one-half of all cases decided on the merits by the Supreme Court. In the five-year period from 1977 to 1981, the government participated in 48 percent of such cases. 7/ During this period, 70 percent of the cases in which the government participated were decided in favor of the government's position. 8/

6/ The number of applications for review against the government in the period 1972 to 1981, including both certiorari petitions to which the government was respondent and appeals in which the government was appellee, was as follows: 1981--1,589; 1980--1,543; 1979--1,513; 1978--1,735; 1977--1,669; 1976--1,906; 1975--1,532; 1974--1,655; 1973--1,623; 1972--1,507.

7/ Cases in which the government participated out of all cases decided by the Court from 1977 to 1981 were as follows: 1981--136 out of 315; 1980--128 out of 277; 1979--158 out of 281; 1978--122 out of 267; 1977--139 out of 276.

8/ Cases decided favorably to the government out of all cases in which the government participated from 1977 to 1981 were as follows: 1981--111 out of 136; 1980--92 out of 128; 1979--104 out of 158; 1978--82 out of 122; 1977--87 out of 139.

The statistical data suggests that the government's re-litigation policy has not been a significant factor in the recent increase in the Supreme Court's workload. Both the number of cases argued before the Court in which the government was a party 9/ and the number of cases accepted for review by the Court in which the government was a party 10/ have decreased each year since 1979, and have generally decreased over the past ten years. 11/

2. Litigation Policy. The Subcommittee's invitation also requested that the Department discuss the effect of government litigation policy or practice on the generation or avoidance of intercircuit conflicts. In general, the government is in the same position as other parties with regard to its ability to re-litigate legal issues before different courts of

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9/ The number of argued cases in which the government participated as petitioner, respondent, appellant or appellee from 1972 to 1981 was as follows: 1981--57; 1980--68; 1979--78; 1978--63; 1977--75; 1976--65; 1975--76; 1974--89; 1973--67; 1972--75.

10/ For example, the number of granted certiorari petitions filed by the government together with the number of granted certiorari petitions to which the government was respondent from 1972 to 1981 were as follows: 1981--63; 1980--79; 1979--94; 1978--88; 1977--81; 1976--114; 1975--80; 1974--93; 1973--108; 1972--87. When the number of mandatory cases accepted for plenary review (set for argument or jurisdiction noted) in which the government was appellant or appellee are added in, the figures are as follows: 1981--83; 1980--95; 1979--103; 1978--96; 1977--88; 1976--123; 1975--94; 1974--114; 1973--128; 1972--102.

11/ See also the figures cited in notes 4-8 supra.

appeals. Following an adverse decision, both the government and the private parties it faces in litigation may assert the view of the law each believes to be correct in later cases before other courts of appeals, or even in later cases before the same court of appeals where that court is asked to overrule an adverse precedent. Experience shows that the government's position is usually vindicated when the Supreme Court finally decides an issue that has been litigated in a number of circuits.

The timing of the decision to seek Supreme Court review, as it relates to intercircuit conflicts, also merits some brief discussion. If the initial decisions on an issue are favorable to the government's position then there is, of course, no basis for the government to seek Supreme Court review. The question will only arise if private parties opposing the government's position decide not to acquiesce in these decisions and obtain favorable rulings upon re-litigation of the issue in later cases.

In some cases where the initial decision is adverse to the government, the issue presented is of such pressing importance that we will seek Supreme Court review immediately. One example is the district court decision in United States v. Ptasynski, 12/ which invalidated the crude oil windfall profits

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12/ Ptasynski v. United States, 550 F. Supp. 549 (D. Wyo. 1982), rev'd, 103 S. Ct. 2239 (June 6, 1983).

tax. More frequently, however, Supreme Court review will not be sought until favorable decisions have been obtained in other circuits. This practice reflects, in part, the fact that the Supreme Court is more likely to grant review if it sees a need to resolve a difference among the circuits. It also reflects the general consideration that a reviewing court is more likely to uphold the position of a litigant if that position is supported by the reasoned opinions of inferior courts.

As a general matter, re-litigation of issues in different circuits, within reason, is not undesirable and has positive value in promoting the sound development of the law. The appellate judges who first address an issue may not fully appreciate the ramifications of their decision. Early decisions may be found to be wrong or overbroad by courts that consider an issue later with the benefit of both the initial decisions and the arguments of counsel that focus on the reasoning and practical consequences of those decisions. Re-litigation of an issue also enables the lower courts to set out different options and to explore different resolutions of a legal question. This aids the Supreme Court when it finally considers the issue.

II. The Need for Restraint

A. Judicial Restraint

While the Supreme Court cannot be faulted for hearing more cases, in light of the caseload explosion in the district and circuit courts, it seems evident that some of the Court's decisions have contributed to that explosion. In recent times, the Supreme Court has demonstrated a hospitality to constitutional arguments which address claims the resolution of which has traditionally been the responsibility of the state judiciaries or the political process. It has been observed that the Court has been part of a trend wherein the role of the courts is viewed less as one of interpreting the Constitution and statutes, guided principally by their text and the legislative intent of the Framers and Congress, to one that encourages courts to resolve public policy questions guided by the perceived values of an enlightened society. 13/ We view this trend of moving from interpretivism to judicial activism as disturbing. To some degree, decisions that expand rights and enlarge judicial remedies foster more litigation and counteract the intended effect of court reform legislation.

The growth of prisoner litigation provides a good illustration of this problem. Thirty years ago, the number of

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13/ See R. Bork, The Struggle Over the Role of the Court, National Review, September 17, 1982, pp. 1137-39.

suits brought by prisoners in the federal courts each year was about thirteen hundred. 14/ Today, the annual figure is about 30,000, and the number continues to increase rapidly from year to year. 15/ Prisoner petitions are exceptional among major categories of federal litigation -- not only are they typically frivolous, but they are also largely unaffected by the normal disincentives to litigation. The expense of attorney's fees and other costs -- a significant deterrent to frivolous suits in most other areas -- is largely absent, since most prisoners sue pro se and qualify for in forma pauperis status. 16/ Since litigation appeals to prisoners primarily as a legitimized form of aggression against the system and a means of relieving boredom, 17/ the normal disincentive of the stress and unpleasantness of litigation is also largely inapplicable.

14/ The number of prisoner suits in 1953 was 1,336; it had been fairly constant for the preceding decade and was 1,204 in 1944. By 1961 the number had increased to 2,609; by 1970 to 15,997; and by 1982 to 29,303. A table giving annual figures from 1961 to 1982 appears in S.Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

15/ See S.Rep. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

16/ See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a) (Dept. of Justice 1979) (in sample studied, 81.8% of habeas corpus petitions in forma pauperis and 79.2% pro se); Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 617 (1979) (prisoner §1983 suits in sample studied overwhelmingly in forma pauperis and pro se); Note, Limitation of State Prisoners' Civil Rights Suits in the Federal Courts, 27 Catholic U.L.Rev. 115, 116-17 (1977).

17/ See generally Note, supra note 16.

Congress never authorized this flood of litigation; its growth is primarily attributable to judicial decisions. The legal basis for such suits was provided primarily in the 1950's, 1960's and 1970's, when the Court expanded the federal causes of action contained in surviving fragments of Reconstruction-era legislation. This is true of both suits under 42 U.S.C. § 1983 18/ and federal habeas corpus petitions by state prisoners, 19/ which together account for the bulk of prisoner litigation. 20/ The Supreme Court, as well as the lower courts, has suffered from the impact of this added caseload. In a recent term, 20 percent of the cases decided by the Court involved § 1983 and over

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18/ See generally Developments in the Law -- Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1153-56, 1169-75 (1977).

19/ See generaly William French Smith, Proposals for Habeas Corpus Reform in R. Rader & P. McGuigan, eds., Criminal Justice Reform: A Blueprint 137, 137-40, 147-50 (1983); Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965); Oaks, Legal History in the High Court--Habeas Corpus, 64 Mich. L. Rev. 451 (1966).

20/ See S.Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

The remedy for federal prisoners corresponding to state prisoner habeas corpus is the motion remedy of 28 U.S.C. §2255. The §2255 motion remedy is essentially a codification of habeas corpus, as it applies to federal convicts, and its expansion in scope through judicial innovation has gone hand-in-hand with the corresponding expansion of state prisoner habeas corpus. The remedy against federal officials corresponding to §1983 suits against state officials is the Bivens-type action, which was created ex nihilo in the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

10 percent of all filings in the Court were state prisoner habeas corpus cases. 21/

The tremendous growth in the number of actions under 42 U.S.C. §1983 deserves particular note. 22/ Section 1983 was enacted in 1871 as a direct response to the rise of Ku Klux Klan terrorism in the South during Reconstruction, and the general unwillingness or inability of the governments in the former Confederate States to control this pervasive disorder. Originally intended as a narrow civil remedy, § 1983 has ballooned into a major source of federal court litigation with a scope far beyond anything that Congress contemplated in 1871. The 1,254 pages of annotations under 42 U.S.C.A. § 1983 (1981) reflect the enormous range of state and local activity that is now the subject of

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21/ See Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 14 (20% of cases decided by Supreme Court in the 1981 term involved § 1983); Justice Lewis F. Powell, Address Before the A.B.A. Division of Judicial Administration, San Francisco, California, Aug. 9, 1982, at 13 n.14 (estimated 450 state prisoner habeas corpus cases filed with Supreme Court in 1981 term); see also id. at 9 n.10 ("During the 1981 Term . . . petitions for certiorari were filed in more than 30 cases by a single prisoner. Each petition . . . became a case on our docket, duplicate copies were sent to each Justice, and each of us had to make a personal decision as to the petition's merit.")

22/ In fiscal year 1960, only 280 suits were filed in federal courts under all federal civil rights statutes. By 1980, approximately 29,000 civil rights actions were brought in federal court, representing more than 16 per cent of the district courts' workload. Most of this increase in civil rights litigation is due to § 1983 suits.

litigation under § 1983. No grievance seems too trivial to escape translation into a § 1983 claim. For example, the question whether a state official who insisted that a student cut his or her hair has invaded a constitutional right and is liable under § 1983 has been before every federal court of appeals and has drawn at least nine denials of certiorari from the Supreme Court, three of them with dissenting opinions. 23/

The dramatic increase in § 1983 litigation is the result of several decisions. First, the Court has held that § 1983 applies to violations of any of the rights that have been incorporated into the Fourteenth Amendment, even though the jurisdictional statute refers only to equal protection violations. 24/ Thus, § 1983 now covers many wrongs previously actionable only in state tort suits. Second, the Supreme Court has held that municipalities and state agencies are "persons" subject to suit under § 1983. 25/ Third, it has held that a municipality has no "good faith" defense to § 1983 actions, where the constitutional violation by its official was pursuant to an official policy or governmental custom. 26/ Finally, because

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23/ Zeller v. Donegal School Dist., 517 F.2d 600, 602-03 (3d Cir. 1975).

24/ 28 U.S.C. 1343(3); Maine v. Thiboubot, 448 U.S. 1 (1980).

25/ Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), overruling Monroe v. Pape, 365 U.S. 167 (1961).

26/ Owen v. City of Independence, 445 U.S. 622 (1980).

exhaustion of state administrative remedies is not a prerequisite to bringing suit under § 1983, 27/ individuals and municipalities often are not given the chance of resolving disputes before cases are filed in federal court.

Increased litigation also is caused when constitutional rights are defined with a level of specificity beyond what one would think could be imputed to the fundamental law of the land. In the areas of obscenity and automobile searches, for example, upon occasion the Court drew lines so fine that a case-by-case determination by the Court seemed to be required in every instance. 28/ When the rules of decision are unclear, litigants have a powerful incentive to petition for Supreme Court review. Now that the Court has adopted bright line rules in these areas, the number of such cases coming to the Supreme Court should decrease significantly. 29/

While the Court has largely resolved these particular issues, new problems have arisen in other areas. The Court's

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27/ Patsy v. Bd. of Regents, ___ U.S. ___, 102 S. Ct. 2557 (1982).

28/ Roth v. United States, 354 U.S. 476 (1957); Jacobellis v. Ohio, 378 U.S. 184 (1964); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82-83 (1973) (Brennan, J., dissenting); Robbins v. California, 453 U.S. 420 (1981).

29/ Miller v. California, 413 U.S. 15 (1973); United States v. Ross, ___ U.S. ___ (1982); New York v. Belton, 453 U.S. 454 (1982).

recent decision in Solem v. Helm, 30/ is a good example. In that case, the Supreme Court invalidated a sentence of life imprisonment without parole imposed on a seven-time felony convict, and held broadly that sentences of imprisonment are hereafter to be scrutinized by the courts for proportionality under a set of criteria stipulated in the Court's opinion. This decision effectively overruled its 1980 decision in Rummel v. Estelle, 31/ and its 1982 decision in Hutto v. Davis, 32/ which to all appearances had barred such review of prison terms. It is predictable that large numbers of incorrigible offenders will now challenge their sentences in federal court, and that considerable efforts will be required to elaborate on the Solem test. 33/

The decision in Solem is particularly disturbing in light of the previous effects that resulted from corresponding developments in the area of capital punishment. Proceeding under the same banner of "proportionality," the Supreme Court, since 1971, has imposed a host of special requirements and restrictions on the imposition of capital sentences. The over-particularization of Constitutional rights in that area, coupled with the open-ended availability of habeas corpus and dilatory tactics by

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30/ 51 U.S.L.W. 5019 (June 28, 1983).

31/ 445 U.S. 263 (1980).

32/ 454 U.S. 370 (1982).

33/ See 51 U.S.L.W. at 5029 (Burger, C.J., dissenting).

defense attorneys in capital cases, has virtually nullified the capital punishment legislation of the states. 34/ For the foreseeable future, it appears that capital cases will be the subject of endless litigation in the state courts, the inferior federal courts, and the Supreme Court itself.

It also appears that the Court may make its job more burdensome by the length of its opinions. Last term, the Court issued ____ full opinions, many of which were long, broad in scope, and heavily footnoted, and which contained an extraordinary number of concurrences and dissents. The number of opinions per case may reflect an unavoidable division of opinion over the correct result in some cases. However, the number of long, exhaustive opinions could be an indication that the Court is not resolving the minimum number of issues on the narrowest possible grounds. 35/

34/ See generally William French Smith, Proposals for Habeas Corpus Reform in P. McGuigan and R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 145-46 (1983); Statement of Justice Lewis F. Powell Before the Eleventh Circuit Conference in Savannah, Georgia, May 8-10, 1983, at 9-14.

35/ For the view of a state justice on how a court can make its job easier without decreasing its docket, see Douglas, How to Write a Concise Opinion, 22 Judges' Journal 4, Spring 1983.

B. Congressional and Executive Restraint

As the federal government has assumed a greater role in the economic and social life of the nation, the function and authority of the federal courts has also greatly expanded. The courts have been charged with the interpretation and implementation of a plethora of new statutes and regulations. In enacting many of these initiatives, and particularly the economic regulatory statutes passed over the last dozen years, Congress has unnecessarily encouraged litigation and, in effect, has left critical policy decisions for resolution by the courts.

The most fundamental objections to this trend reflect concerns of federalism and the separation of powers; the increased power of the federal judiciary is necessarily at the expense of the functions of the state judiciaries and the Constitutional prerogatives of the political branches of government. The caseload problem provides additional support for a cautious attitude by Congress and the Executive toward proposals to enlarge the role of the courts.

If all federal statutes were precise and unambiguous, and judicial review of their implementation were narrowly circumscribed, the resulting role and workload of the courts would be less significant. Under many federal statutes, however, the substantive standards or standards of review (or both) are

ambiguous or inconsistent. 36/ This thrusts the courts into a policy-making role and ensures that abundant opportunities for litigation will arise in the administration of the affected programs.

The adverse consequences of effectively delegating legislative functions to the courts through vague or open-ended statutes are frequently compounded by legislative decisions to delegate enforcement functions to unaccountable private interests. 37/ This tendency is reflected both in broad statutory definitions of the classes of persons given standing to challenge administrative action and in ever-broader statutory authorization of awards of attorney's fees against the government. 38/ Under the

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36/ Examples include the Freedom of Information Act, 5 U.S.C. § 552; Clean Air Act, 42 U.S.C. §§ 7401 et seq.; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq.; Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 et seq.; Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq.; and Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.

37/ Private parties are currently empowered to enforce a broad range of regulatory statutes including the Clean Air Act, 42 U.S.C. § 7604; Endangered Species Act, 16 U.S.C. § 1540(g); Federal Water Pollution Control Act, 33 U.S.C. § 1365; Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g); Noise Control Act of 1972, 42 U.S.C. § 4911; and Toxic Substances Control Act, 15 U.S.C. § 2619.

38/ Recent statutes authorizing awards of attorney's fees against the government that have encouraged large numbers of cases include the Clean Air Act, 42 U.S.C. §§ 7604(d),

(Footnote Continued)

traditional American rule, each party bears its own costs of litigation. The statutory departures from this rule are typically one-sided. They frequently result in the routine award of fees to a party prevailing against the government. They do not, however, provide any comparable authorization for the government to recover the full costs of a suit it has defended at the public's expense where the outcome of the litigation demonstrates that the suit was unwarranted. With the incentives structured in this manner, it is inevitable that such suits will proliferate.

Considering the effects of broad judicial review in many areas and the workload crisis in the court system, proposals to create judicial review in areas in which it does not currently exist should be approached with caution. In the area of veterans benefits determinations, for example, judicial review is now generally barred by statute. 39/ The Senate has passed legislation which would create judicial review in that area. 40/ When the courts are struggling with their current caseloads, one may question the wisdom of a change the immediate effect of which

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(Footnote Continued)

7607(f), 7622(b)(2)(B) and (e)(2); Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988; and Freedom of Information act, 5 U.S.C. § 522(a)(4)(E).

39/ See 38 U.S.C. § 211(a).

40/ S. 349 of the 97th Congress.

would be several thousand additional cases a year in the district courts. 41/

Proposals to increase the scope of judicial review in areas in which it currently exists in a more limited form are another type of change that merits careful scrutiny in light of these concerns. The proposal to eliminate the presumption of validity for administrative action (the "Bumpers Amendment") provides an example. 42/ If parties challenging administrative action have the benefit of review standards that afford them a greater likelihood of success, such challenges will necessarily be brought with greater frequency.

III. Legislative Reforms

In the long run, judicial restraint and the enactment of legislation that neither encourages litigation nor defers legislative decisions to the courts is the surest way to bring the caseload explosion under control. However, there are immediate steps that could be taken to reduce federal caseloads. Several reform proposals now before Congress would go far toward

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41/ See S. Rep. No. 466, 97th Cong., 2d Sess. 141-43 (1982) (Department of Justice caseload projection).

42/ See generally Statement of Assistant Attorney General Jonathan C. Rose on S. 1080 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary (Sept. 21, 1983).

meeting the workload problem faced by the Supreme Court and the rest of the federal judiciary.

A. Supreme Court Mandatory Appeals

As stated in our letter of September 8 on H.R. 1968, the proposal to make the Supreme Court's appellate jurisdiction fully discretionary, except for appeals from three-judge district courts, should be enacted immediately. 43/ In the 1982 term, for example, 21 appeals set for oral argument would have been eligible for review only by certiorari under the reform. 44/ There is no means of determining precisely how many of these cases would have been accepted for discretionary review. However, the Justices have stated that they often find it necessary to call for full briefing and oral argument in mandatory appeal cases of no general public importance on account of the complexity of the legal questions presented. 45/ Since such cases would simply be

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43/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino Concerning H.R. 1968 (Sept. 8, 1983).

44/ The figure of 21 does not include four appeals from three-judge district courts, which would not be affected by the reform of H.R. 1968. The remaining cases set for argument in the term were 154 certiorari cases and 3 original jurisdiction cases.

45/ See Mandatory Appellate Jurisdiction of the Supreme Court -- Abolition of Civil Priorities -- Juror Rights, Hearing on H.R. 2406, H.R. 4395 and H.R. 4396 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 22

(Footnote Continued)

denied review if presented on certiorari, it is clear that the reform would be of significant value in reducing the Supreme Court's workload, though not by itself sufficient to resolve the workload problem. 46/

B. Diversity Jurisdiction

The Department of Justice has consistently supported proposals to limit or abolish diversity jurisdiction, 47/ which in the past year burdened the federal district courts with over 57,000 state law cases. Diversity cases account for about one-quarter of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the federal courts. The general elimination of diversity jurisdiction would not only relieve the district courts of this burden, but would also produce a large reduction in the workload of the courts of appeals -- about 15 percent of all appeals of district court decisions arise in diversity cases.

(Footnote Continued)

(1982) (letter of the Justices to Chairman Kastenmeier).

46/ See Justice Sandra Day O'Connor "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 12.

47/ See generally Diversity of Citizenship Jurisdiction: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 7-12 (1982) (testimony of Assistant Attorney General Jonathan C. Rose).

The House of Representatives has passed a bill to abolish diversity jurisdiction in the past. Last year, this Committee again reported the proposal favorably. 48/ Unfortunately, this important reform has not been viewed favorably by the Senate. I should note, Mr. Chairman, that you recently introduced a series of bills that would limit diversity jurisdiction in different ways. The Department continues to support the complete abolition of diversity jurisdiction as the best approach. While we have not yet taken formal positions on the specific proposals in these bills, we are encouraged by the practical and flexible approach they represent, and hope that they may provide the basis for a generally acceptable compromise.

C. Habeas Corpus

There is a generally recognized need for reform in the system of federal collateral remedies, including federal habeas corpus for state prisoners, by which the federal courts effectively engage in appellate review of state criminal cases. 49/

48/ See 128 Cong. Rec. H 6023 (daily ed. July 29, 1983) (remarks of Rep. Kastenmeier).

49/ See, e.g., Rose v. Lundy, 455 U.S. 509, 546-47 (1982) (Stevens, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); Chief Justice Warren E. Burger, 1981 Year-End Report on the Judiciary 21; Sandra Day O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William & Mary L. Rev. 801, 914-15 (1981);

(Footnote Continued)

The Administration's habeas corpus reform proposals were considered expeditiously in the Senate following their transmittal in March of 1982, and they have been reported favorably by the Senate Judiciary Committee in this Congress by a vote of 12 to 5. 50/ There have, however, been no hearings or other action on the proposals in this Subcommittee in the twenty months since their transmittal, though a number of the Subcommittee's members have sponsored bills incorporating them. 51/ We strongly recommend that the Subcommittee act promptly on our proposals in the next session of Congress.

(Footnote Continued)

Justice Lewis F. Powell, supra note 21, at 9-13; Interview with Justice Potter Stewart, 14 The Third Branch 1 (Jan. 1982); Judge Carl McGowan, The View from an Inferior Court, 19 San Diego L. Rev. 659, 667-68 (1982); Judge Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 223-24, 231-40 (1982); see generally S. Rep. No. 226, 98th Cong., 1st Sess. 3-6 (1983).

50/ See S. Rep. No. 226, 98th Cong., 1st Sess. 31 (1983). The Senate bill is S. 1763; the corresponding House bill in the current Congress is H.R. 2238. See generally the cited Senate Committee Report, supra; The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 16-107 (1982) (Administration statements and testimony); William French Smith, supra note 19.

51/ See S. Rep. No. 226, 98th Cong., 1st Sess. 2 nn.3-4 (1983).

D. Administrative Alternatives to Litigation

In certain areas, the replacement or supplementation of existing judicial remedies with more efficient administrative mechanisms is a promising reform option. 52/ We have supported a general authorization of the imposition of civil penalties for fraud under government funding and assistance programs by administrative process. 53/ This reform would reduce the litigation burden on both the courts and the government while making the administration of these programs and the punishment of fraudulent practices more effective.

E. Other Reforms

There are various other possibilities that may be considered in addressing the workload problem of the courts.

52/ See generally Recommendations and Reports of the Administrative Conference of the United States 23-26, 203-375 (1979) (regarding monetary penalties for regulatory violations); Erwin N. Griswold, "Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts," The Brendan F. Brown Lecture Delivered at Catholic U. of America Law School, Washington, D.C., March 23, 1983, at 14 (regarding employers' liability).

53/ See Program Fraud Civil Penalties Act: Hearing on S. 1780 Before the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 11-29 (1982) (testimony of Assistant Attorney General J. paul McGrath).

While we have not yet taken a position on specific reforms discussed below, we believe that they merit serious study and consideration.

In areas in which there is a particularly great need for technical expertise or for national uniformity and certainty in the law, there may be value in increased use of appellate forums with exclusive nationwide jurisdiction. The principal existing example is the Federal Circuit Court of Appeals, which has exclusive jurisdiction over appeals in such areas as government contracts, international trade, and patents. 54/ This type of reform directly reduces the workload of the regional appellate courts by transferring certain classes of cases to national forums. Since a substantial part of the Supreme Court's work consists of resolving differences that arise among the various circuits, consolidating appeals in a single forum tends to reduce the Supreme Court's workload as well. 55/

54/ This approach is exemplified to a more limited extent by the District of Columbia Circuit Court of Appeals. The D.C. Circuit has concurrent jurisdiction with the regional appellate courts in review of most types of administrative action, but in some areas its jurisdiction is exclusive. The Temporary Emergency Court of Appeals, a specialized court staffed by judges from the regular circuit courts, illustrates a different approach to consolidated appellate review.

55/ Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 12-13; Remarks of Justice William J.

(Footnote Continued)

Forums with nationwide jurisdiction also currently exist at the trial level -- the Court of International Trade, the Tax Court and the Claims Court. Trial courts of this type also reduce the workload of the regionally-based courts by handling certain classes of cases that would otherwise have to be adjudicated in the district courts. If a trial court of nationwide jurisdiction has exclusive jurisdiction in its subject matter area and review of its decisions is limited to a single appellate court, economies result for the regional circuit courts and the Supreme Court as well.

There may be additional areas in which creation of courts with nationwide jurisdiction in defined subject matter areas would be beneficial. For example, proposals have been advanced to create an Article I court to assume the reviewing function in Social Security cases, which is presently carried out in the district courts. 56/ While we have not yet taken a position on this proposal, we view the idea with great interest. 57/

(Footnote Continued)

Brennan at the Third Circuit Judicial Conference, Philadelphia, Pennsylvania, Sept. 9, 1982, at 6-7; Interview with Chief Judge Howard T. Markey of the Federal Circuit Court of Appeals, 15 The Third Branch 1, 7 (Oct. 1983) (no petitions for certiorari granted by Supreme Court to review Federal Circuit decisions in first year of its existence).

56/ See, e.g., H.R. 3865 and H.R. 5700 of the 97th Congress.

57/ In 1981, the number of Social Security cases in the district court was 9,000; in 1982 it was 13,000. Extrapolating from (Footnote Continued)

F. Omnibus Judgeships.

We have suggested a number of measures to decrease the number of cases filed in the federal court system, and thereby reduce the pressure on the Supreme Court from below. However, just as the Supreme Court may need some help until a broad-based program of judicial reform and caseload reduction is enacted, so do the lower federal courts. Their caseload increases have been even more striking than those recently faced by the Supreme Court. As long as the caseloads continue to grow, and as long as the jurisdiction of the courts and the incentives to litigate remain the same, the need for new district and circuit judges must be met.

Every two years, the Judicial Conference of the United States conducts an exhaustive study of the need for new judgeships. The Department's experience has been that both the procedures and the recommendations of the Judicial Conference are sound. Since the last judgeship bill was passed in 1978, the Judicial Conference has twice identified the new positions that are needed. While the Senate has incorporated the Judicial Conference's 1982 recommendations in S. 1013, the bankruptcy courts bill approved by the Senate last April, the House has

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the figures for the first nine months of the present year, it appears that the corresponding figure for 1983 will be about 24,000.

taken no action. We strongly urge that action be taken in the near future to create these positions.

IV. The Intercircuit Tribunal Proposal

A final legislative option to reduce the workload of the Supreme Court that has received considerable public and Congressional attention in the past year is the proposal to provide the Court with an adjunct tribunal to which cases could be referred for a nationally binding decision.

A. General Considerations

Near the start of this year, Chief Justice Burger advanced the proposal to create an Intercircuit Tribunal as an immediate response to the workload problem of the Supreme Court. This proposal has since been introduced in the House of Representatives as H.R. 1970 and has been reported by the Subcommittee on Courts of the Senate Judiciary Committee as Title VI of S. 645.

The Intercircuit Tribunal proposal would provide the Supreme Court with an adjunct tribunal to which cases could be referred for a nationally binding decision. All versions of the proposal have had certain common features. The Tribunal would automatically go out of existence at the end of a certain period of time unless renewed or continued by new legislation. The Tribunal would be composed of sitting circuit judges. The Supreme

Court could refer any type of case to the Tribunal for a nationally binding decision. The decisions of the Tribunal would be reviewable by certiorari in the Supreme Court.

For reasons to be discussed below, we believe that creation of a properly designed Tribunal of this type would have the intended effect of reducing the Supreme Court's workload. The initial question, then, is whether other policy concerns outweigh the value of the Tribunal in achieving this objective.

We would see such overriding concerns if the proposal were for a permanent Tribunal. The basic objection to a permanent Tribunal is that it does not go to the root of the problem. No long-term solution to the excessive workload of the Supreme Court can be achieved unless steps are also taken to decrease the intake of cases at the lower levels of the judiciary. There are, moreover, other important grounds supporting a broader approach to the problem.

The recent history of the federal judiciary has been one of explosive growth. The external manifestations are apparent to any observer of the judicial system -- the continued rise in the number of judgeships, which invariably lags behind the still more rapid rise in caseloads; the increased reliance on adjuncts and other support personnel; and the development of ever more elaborate administrative and management apparatus in the judicial branch. These obvious external changes are accompanied

by more subtle yet profoundly important qualitative changes in the exercise of the judicial function. The traditional values of reflection and deliberation, articulation of the grounds of decision, and personal decision-making by judges have begun to give way to the need to move cases through the system as quickly as possible. The quality of judges, no less than the quality of their decisions, is threatened by this development. If the judiciary evolves into another large bureaucracy, the prospect of service on the federal bench will lose its luster. The difficulty of interesting attorneys of the highest caliber in such service would increase accordingly.

We should not accept the indefinite continuation of this trend, contenting ourselves with ad hoc structural reforms addressing its symptoms. We have accordingly opposed, and continue to oppose, the creation of a National Court of Appeals as a permanent fixture of the federal judicial system. One concern raised by any proposal to create a permanent Tribunal is that it would accelerate the bureaucratization of the judiciary. However, the largest concern raised by the proposal to create such a court is that it would have precisely the effects its proponents have claimed for it -- its enlargement of the appellate capacity at the national level would accommodate the expansion of the judicial function that has occurred as far, and would open the way for further expansion in the future. The concerns raised by the continuation of this trend include both the destruction of the traditional character of the judiciary and basic

concerns for federalism and the separation of powers. As noted earlier, the extension of the federal courts' role is necessarily at the expense of the functions of the state judiciaries and the role of the political branches in the Constitution's plan of government.

While the foregoing concerns are sufficient to warrant opposition to the creation of a permanent national court or tribunal attached to the Supreme Court, we do not see objections of comparable force to the temporary creation of an Intercircuit Tribunal as an immediate response to the workload problem of the Supreme Court. A temporary Tribunal would provide time for the enactment and implementation of a broad based response to the judicial workload problem through the measures discussed earlier in my testimony and other reforms that may be developed in future study of the problem by Congress, the Department of Justice and the judiciary. The objections and concerns noted above apply with less force to a strictly provisional measure, and we believe that they do not outweigh the likely value of a temporary Tribunal in meeting the current workload problem of the Supreme Court. Our conception of the Tribunal as a temporary measure is consistent with that expressed in the statement of the Chief Justice, who also characterized an intercircuit panel or tribunal

as an emergency measure that would buy time for the development of long-term solutions. 58/

B. The Character of the Tribunal

Our support for the creation of a temporary Intercircuit Tribunal is conditioned on certain understandings concerning the structure and constitution of the Tribunal, which go to its basic character:

1. A Temporary Tribunal. The Tribunal must be limited in duration. The Tribunal should not become an entrenched institution or be regarded as a stepping-stone to the inevitable establishment of a permanent National Court of Appeals. Congress should pursue aggressively other reforms addressing the caseload problem; it should review frequently the continued need for the Tribunal; and it should terminate the Tribunal as soon as other measures have reduced the Supreme Court's docket to manageable dimensions. For these purposes the basic five-year period proposed in the pending bills is more than adequate, and might well be reduced. We believe that a three-year period would be more appropriate. 59/ Additional grounds for this conclusion

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58/ See Annual Report on the State of the Judiciary 8-11 (Feb. 6, 1983).

59/ H.R. 1970 and the original version of the Senate proposal provide for a flat five-year period. The version voted out

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appear in the analysis of the design of the Tribunal later in my testimony.

2. A Unitary Tribunal. Both H.R. 1970 and the original Senate version of the Intercircuit Tribunal proposal contemplated a Tribunal consisting of a large pool of judges sitting in shifting panels. We fully agree with the predominant view of the participants in the Congressional hearings on the proposal that this structure would be unsound. The Tribunal should consist of a single panel hearing all cases en banc, as provided in the current Senate version of the proposal. 60/ A multi-panel Tribunal would simply generate new conflicts and instabilities, and would be inconsistent with the proposal's objective of achieving decisional consistency and minimizing the time the Supreme Court must invest in resolving differences among lower

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by the Senate Courts Subcommittee provides for a five-year period commencing with the initial reference of a case to the Tribunal, and contemplates that the Tribunal would continue beyond the end of this five-year period for the time necessary to dispose of pending cases. We would have no objection to the exclusion of start-up time and the continuation to finish pending cases proposed in the current Senate version so long as the basic period were three years rather than five.

60/ The Senate proposal qualifies the single-panel structure of the Tribunal slightly be providing that it is to include four alternate judges as well as a regular panel of nine judges. This approach has been endorsed by the Chief Justice. See Remarks of Chief Justice Warren E. Burger at the 60th Annual Meeting of the American Law Institute 5 (May 17, 1983). We would not oppose this qualification so long as it were made clear that participation by alternates would be limited to situations in which regular judges of the panel were disqualified or unavoidably absent.

courts. Moreover, broad participation by circuit judges in the Tribunal's work is not inherently desirable. Making nationally binding decisions in every area of federal law should not be the occasional avocation of a large part of the federal appellate bench, but should be limited to those judges who are most highly qualified to assume this momentous responsibility.

3. Selection by the Justices. H.R. 1970 and the original Senate version of the proposal provided for selection of the Intercircuit Tribunal by the judicial councils of the various circuits. We are in full agreement with the general view of the participants in the hearings on the proposal that it would be unsound to involve the judges of the inferior courts in the selection of the Tribunal. It has been aptly observed that election of judges to a higher position by their peers is not likely to be a happy process. Nor is it apparent how selection of the Tribunal by the circuit and district judges comprising the circuit councils would advance the proposal's objectives.

Given the relationship between the Tribunal and the Supreme Court contemplated by the proposal, there is obvious value in utilizing a selection procedure which ensures that the judges on the Tribunal enjoy the confidence of the Supreme Court. The extent to which the creation of the Tribunal achieves its essential purpose -- reducing the workload of the Supreme Court -- will depend on the willingness of the Court to refer cases to the Tribunal and to let its decisions stand. The provision of

the current Senate version of the proposal for assignment of judges to the Tribunal by the Supreme Court ensures that the Tribunal will enjoy the confidence of the Court and constitutes an appropriate approach to the selection of a temporary Intercircuit Tribunal. 61/

C. Probable Effects of the Tribunal

1. Effects on the Work of the Supreme Court. We think that reference of cases to the Tribunal would have the intended effect of reducing the Supreme Court's workload. We are not persuaded by certain objections that have been raised to this conclusion.

It has been argued that the option of referring cases to the Tribunal would complicate the process of screening applications for review in the Supreme Court. It is not apparent, however, that choice among three options (grant, deny or refer) is substantially more difficult or time-consuming than choice

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61/ An alternative possibility suggested in the course of the hearings on the proposal -- selection by the Chief Justice subject to confirmation by the Supreme Court -- would be equally appropriate.

Our endorsement of selection of the Tribunal by the Justices of the Supreme Court is contingent on its provisional character. If a long-term or permanent version of the Tribunal is proposed at a later point, we would reserve the right to insist that its members be chosen by the President subject to Senate confirmation.

between two options (grant or deny). The ability to refer cases to the Tribunal could actually smooth the screening process by providing a third option for cases that are marginal candidates for Supreme Court review and currently occasion disagreement among the Justices.

It has also been argued that the economies resulting from reference of cases to the Tribunal would be offset by the need to monitor the decisions of the Tribunal and to grant review of its decisions. It is unlikely, however, that the Supreme Court would frequently grant certiorari in cases coming back to it from the Tribunal, since these would be cases the Justices had already decided did not require their personal attention.

The force of both of these objections is further reduced by the discretionary nature of the reference jurisdiction in the pending proposals. If the Justices were to find that referring certain types of cases -- or any cases -- to the Tribunal was counterproductive in terms of reducing their work-load, they could simply refrain from making such referrals.

A further objection is that creation of the Tribunal would result in an increase in the number of applications to the Supreme Court for review, since the likelihood of obtaining further review would increase. It is not apparent that any large effect of this sort would occur, because the odds that any particular case would be accepted for review -- and particularly

the marginal petitions that would not otherwise have been filed -- would still be small. Nevertheless, even if this prediction is correct, it does not substantially reduce the value of the reform. Since the Supreme Court's jurisdiction is predominantly discretionary -- and would be almost wholly discretionary with the enactment of H.R. 1968 -- a larger number of applications would not mean that more cases would have to be accepted for review. Some increase in screening work would result, but screening petitions takes only a limited part of the Justices' time. Moreover, the work involved in screening petitions can be delegated to support staff to a much greater extent than the work involved in deciding cases on the merits.

A final objection -- which goes more to the issue of quality than quantity -- is that creation of an Intercircuit Tribunal would sacrifice an advantage of the current system under which important issues have often been examined intensively by a number of lower courts by the the time they are presented to the Supreme Court for a final decision. However, this "simmering" process would not be ended by creation of the Tribunal. Reference to the Tribunal would be in the discretion of the Supreme Court; if the Court believed that an issue was not ripe for a nationally uniform decision, it would retain the option of denying review rather than referring the case to the Tribunal for a premature decision. Similarly, under the proposals, the Tribunal itself would have the option of denying review on this ground unless directed to decide a case by the Supreme Court.

2. Effects on Government Litigation. Adoption of the Intercircuit Tribunal proposal would probably cause some increase in the workload of the litigating divisions of the Department of Justice and a substantial increase in the workload of the Solicitor General's office. However, we do not foresee any substantial adverse impact on our representation of the government. A positive contribution of the Tribunal to government litigation is that it will enable us to seek review of some additional appellate decisions we consider erroneous, where we currently would not seek review because of the Supreme Court's limited capacity. 62/

D. Questions of Design

My final remarks address some specific concerns over the design of the Intercircuit Tribunal:

1. Terms of Service on the Tribunal. At the hearings on the Intercircuit Tribunal proposal, authorities whose views merit respect expressed conflicting views concerning the proper length of terms of service on the Tribunal. There was support both for assigning judges to the Tribunal for the full period for

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62/ See generally Griswold, Rationing Justice -- The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335, 341-44 (1975).

which it is established and for the alternative of having judges serve on the Tribunal for three-year staggered terms. 63/

Each of these approaches offers certain advantages and disadvantages. A fully stable composition for the Tribunal would produce the greatest degree of consistency and predictability in its decisions. This would minimize the incentive for litigants to pursue appeals in the hope that an earlier adverse precedent of the Tribunal will be distinguished or limited in a later case.

Conversely, shorter terms of service would enable the Supreme Court to assess the performance of the various judges on the Tribunal at reasonable intervals and to make appropriate decisions concerning each judge's suitability for continued service. This approach does raise larger concerns over potential instability in the Tribunal's case law resulting from changes in its composition. However, this concern would be minimized if the Supreme Court were to reappoint the same judges to successive terms on the Tribunal unless some reason appeared for replacing a particular judge. 64/

63/ Compare Testimony of A. Leo Levin on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary 17-18 (March 11, 1983) with Statement of Daniel J. Meador on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary 6, 8 (April 8, 1983).

64/ While we would expect that the Supreme Court will give due weight to the need for stability and continuity in the Tribunal's composition, we would not favor placing any

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An approach that combines the advantages and avoids the disadvantages of the preceding options would be to reduce the period for which the Tribunal is established from five years to three, as suggested earlier, and to provide that judges are to serve on the Tribunal for the full period. This would result in a temporary Tribunal with a stable composition, minimizing concerns over unpredictability or inconsistency in the Tribunal's decisions. If the Tribunal were allowed to lapse at the end of the initial three-year period, no further questions concerning service on it would be presented. If it proved necessary to continue the Tribunal beyond the initial period, the suitability of the judges on it for further service could be considered at that point.

2. Judges Eligible for Assignment to the Tribunal. We think that the pending bills' unrestricted authorization for the assignment of senior judges to the Tribunal merits further consideration. A Tribunal composed largely or predominantly of senior judges could well encounter public image problems. While there are many highly capable senior judges who might be considered for assignment to the Tribunal, the decision to assume senior status usually reflects a need or desire to carry something less than the full workload of an active judge. Since senior judges do not normally participate in the en banc

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formal constraints on the Court's ability to replace a judge on the Tribunal.

decisions of the circuits, a Tribunal with a heavy concentration of senior judges would be less in touch with the current development of federal law in the courts of appeals than a Tribunal in which active judges predominate. It seems desirable for these reasons to impose some limit on the number of senior judges who could serve. Our specific recommendation would be to provide that a single-panel Tribunal of nine judges must include at least six judges in active service.

3. Other Questions. Three final issues merit brief discussion. First, following a suggestion of the Chief Justice, 65/ the current Senate version of the proposal provides that the Tribunal will share a clerk's office and other support staff and facilities with the Federal Circuit Court of Appeals. This is a sensible approach which would decrease start-up time, reduce the cost of operating the Tribunal, and minimize disruption among support personnel when the Tribunal is terminated.

Second, the pending bills make no provision for removal of judges from the Tribunal in case of incapacity or misconduct. This omission could be easily remedied by providing that the Supreme Court may remove a judge from the Tribunal.

65/ See Annual Report on the State of the Judiciary 9-10 (Feb. 6, 1983).

Third, the legislative proposals contemplate that the Tribunal will devise and promulgate rules of procedure for its proceedings. Considering the close relationship of the Supreme Court and the Tribunal and the fact that the Tribunal's caseload will consist entirely of cases referred to it by the Supreme Court, it may be useful to provide that the Supreme Court may modify or repeal rules adopted by the Tribunal and may issue additional rules governing the Tribunal's proceedings and activities.

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To summarize, while the volume of federal government litigation in the Supreme Court has not increased in the past ten years, the tremendous growth of litigation in the federal courts over the same period has resulted in a workload problem in the Court. A response that only addressed and temporarily accommodated the effects of this litigation explosion would be inadequate. It is essential that the growth in the caseload of the Supreme Court and the lower federal courts be addressed by a broad based set of reforms. Generally, the courts must exercise judicial restraint and the Congress must act in a manner that will decrease rather than increase the incentives to litigation.

Specific measures that should be adopted in response to the caseload problem include completing the evolution of the Supreme Court's jurisdiction toward discretionary review,

limiting or eliminating diversity jurisdiction, addressing the problem of prisoner petitions, and developing, in appropriate areas, administrative alternatives to litigation. While we reject the permanent establishment of an adjunct tribunal to the Supreme Court as a part of this general response, we think that creation of such a tribunal is desirable as a temporary measure addressing an immediate problem.

I would be pleased to answer any questions the Committee may have.